

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

DOCKET FILE COPY 07/1/97

Policy and Rules Concerning the
Interstate, Interexchange Marketplace
Implementation of Section 254(g) of the
Communications Act of 1934, as amended

)
)
)
)
)

CC Docket No. 96-61

CONSOLIDATED REPLY OF IT&E OVERSEAS, INC.

Margaret L. Tobey
Phuong N. Pham

Akin, Gump, Strauss, Hauer & Feld, L.L.P.
1333 New Hampshire Avenue, NW
Suite 400
Washington, DC 20036
(202) 887-4000
(202) 887-4288 (fax)

November 12, 1997

COUNSEL FOR IT&E OVERSEAS, INC.

Copy
11/12/97

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

| | | |
|---|---|---------------------|
| Policy and Rules Concerning the |) | |
| Interstate, Interexchange Marketplace |) | |
| |) | CC Docket No. 96-61 |
| Implementation of Section 254(g) of the |) | |
| Communications Act of 1934, as amended |) | |

To: The Commission

CONSOLIDATED REPLY OF IT&E OVERSEAS, INC.

I. INTRODUCTION

Pursuant to Section 1.115 of the rules of the Federal Communications Commission ("FCC" or the "Commission"), 47 C.F.R. § 1.115, and FCC Public Notice, DA 97-2090, released on September 26, 1997, IT&E Overseas, Inc. ("IT&E"), by its attorneys, hereby submits this consolidated reply to the oppositions and comments of the Guam Telephone Authority ("GTA") and the governments of Guam ("Gov-Guam"), the Commonwealth of the Northern Mariana Islands ("Gov-CNMI"), Hawaii ("Gov-Hawaii"), and Alaska ("Gov-Alaska") (collectively, the "Commenters"), filed in response to IT&E's Application for Review, filed on August 29, 1997.¹

In its Application for Review, IT&E requested the Commission to review and reverse the decision of the Deputy Chief of the Common Carrier Bureau (the "Bureau") to (1) prohibit uniform interexchange rate schedules containing individual rates that vary based on the terminating location of a call, and (2) extend the FCC's rate integration rule to temporary promotions and private line services. See Memorandum Opinion and Order, CC Docket No. 96-61 (Com. Car. Bur., released July 30, 1997) ("MO&O"). IT&E demonstrated that the Bureau's

¹ Although the September 26th Public Notice established November 11, 1997, as the deadline for filing reply comments, the FCC was closed on that day in observance of Veterans Day. Section 1.4(j) of the FCC's rules, 47 C.F.R. § 1.4(j), provides that if the filing date falls on a holiday, the document shall be filed on the next business day. Accordingly, this Consolidated Reply is timely filed.

action directly conflicts with the express statutory language and legislative purpose of Section 254(g) of the Communications Act of 1934, as amended (the “Act”), 47 U.S.C. § 254(g), as well as with the Commission’s own rules and policies, including the Report and Order, CC Docket No. 96-61 (released Aug. 7, 1996), implementing Section 254(g). See IT&E Application for Review, CC Docket No. 96-61 (filed Aug. 29, 1997).

In response to IT&E’s Application for Review, the Commenters oppose any interpretation of the rate integration rule that would allow interexchange carriers (“IXCs”) the flexibility to adopt rates that vary based on the terminating location of a call. See Joint Comments of GTA and Gov-Guam, at 2-3 (filed Oct. 28, 1997); Opposition of Gov-CNMI, at 2-4 (filed Sept. 15, 1997); Opposition of Gov-Hawaii, at 4-8 (filed Sept. 15, 1997); Comments of Gov-Alaska, at 2-3 (filed Sept. 15, 1997). The Commenters, however, disagree on whether the rate integration rule should be extended to temporary promotions and private line services. Specifically, GTA and Gov-Guam agree with IT&E that the Bureau’s extension of the rate integration rule to temporary promotions and private line services conflicts with the Commission’s express exemption of temporary promotions and private line services from the geographic rate averaging rule. See Joint Comments of GTA and Gov-Guam, at 4. Gov-CNMI, Gov-Hawaii, and Gov-Alaska, on the other hand, refuse to acknowledge any such conflict and thus support a liberal construction of the rate integration rule that would apply to temporary promotions and private line services. See Opposition of Gov-CNMI, at 4-5; Opposition of Gov-Hawaii, at 2-4; Comments of Gov-Alaska, at 3-5.

As demonstrated below, the Commenters fail to offer any legitimate basis to support a broad, non-literal interpretation of the rate integration rule that would strictly prohibit the adoption of variable terminating rates. Moreover, while GTA and Gov-Guam support IT&E’s request for Commission review of the Bureau’s refusal to exempt temporary promotions and private line services from rate integration, the remaining Commenters fail to offer any rational justification for exempting such services from geographic rate averaging, but not rate integration.

II. Rate Integration Does Not Require a Blanket Prohibition on Variable Terminating Rates

The Commenters fail to refute the undeniable fact that Section 254(g), by its express terms, does not prohibit an IXC from adopting variable terminating rates, as long as the same rates apply equally to all of the IXC's subscribers. Indeed, GTA and Gov-Guam concede that allowing IXCs to adopt variable terminating rates is consistent with a literal interpretation of Section 254(g). See Joint Comments of GTA and Gov-Guam, at 2. Although Gov-Hawaii contends that the express language of Section 254(g) prohibits the adoption of variable terminating rates, it fails to explain how such rates conflict with the statutory language requiring an IXC to provide service to all of its subscribers in each state "at rates no higher than the rates charged to its subscribers in any other State." See Opposition of Gov-Hawaii, at 4-5. Gov-Hawaii simply suggests that the express language of Section 254(g) requires an IXC to charge, for example, customers in Hawaii the same rates that it charges customers in California for calls between the two states. Id. at 5. Such an interpretation, however, fails to address the fundamental issue of whether Section 254(g), by its terms, prohibits an IXC from adopting variable terminating rates, where such rates are applied equally to all of the IXC's subscribers.

Moreover, Gov-Alaska is incorrect in arguing that allowing IXCs any flexibility to adopt variable terminating rates would violate the express language of Section 254(g) by allowing IXCs to provide certain services, such as collect calling and toll free services, to customers in some states at rates higher than those charged to customers in other states. See Comments of Gov-Alaska, at 2. IT&E has never advanced the position that Section 254(g), by its terms, allows IXCs to charge higher rates to customers in certain states for services such as collect calling and toll free services. Indeed, IT&E agrees that such a practice would appear to violate the express language of Section 254(g). Gov-Alaska, however, fails to explain how the

adoption of variable terminating rates which apply equally to all of an IXC's subscribers would conflict with the express language of Section 254(g).

Furthermore, the Commenters fail to offer any evidence of a Congressional intent to deny IXCs the flexibility to adopt variable terminating rates. While the language and legislative history of Section 254(g) reveal a Congressional intent to prohibit IXCs from charging excessive and discriminatory rates that are based on a subscriber's geographic location, there is absolutely no evidence of any Congressional intent to intrude further upon an IXC's ability and discretion to set rates by prohibiting variable terminating rates that are applied equally to all subscribers. In addition, while the Commenters do not dispute that Congress intended to codify the FCC's then-existing rate integration policy, none can cite to any prior FCC policy statement or case precedent prohibiting IXCs from adopting variable terminating rates, where such rates are applied equally to all subscribers.² Significantly, the Commenters do not offer any evidence to refute the fact that the FCC historically has permitted IXCs, such as AT&T, MCI, and Sprint, to maintain separate and significantly higher rates for calls terminating in Puerto Rico and the Virgin Islands, as opposed to calls terminating elsewhere in the United States. See IT&E Application for Review, at 5-6. Thus, in view of the Congressional intent to codify the FCC's existing rate integration policy and in view of the FCC's apparent prior approval of differential rates for calls terminating in certain U.S. offshore locations, IT&E fails to understand how

² Gov-Alaska has suggested that the FCC's prior extension of rate integration to inward Wide Area Telecommunications Services ("WATS") demonstrates a clear policy against variable terminating rates. See Comments of Gov-Alaska, at 3. Contrary to Gov-Alaska's suggestion, however, the FCC's then-existing rate integration policy prohibited variable terminating rates for inward WATS only because the subscribers of such services would have been the call recipients, not the calling parties. Thus, the FCC's prohibition against variable terminating rates for inward WATS is consistent with its established policy of requiring IXCs to charge their subscribers comparable rates regardless of a subscriber's geographic location. Such a prohibition against variable terminating rates in this very limited context does not reveal any established FCC policy of prohibiting variable terminating rates that apply equally to all subscribers.

Congress could have ever intended to strictly prohibit IXCs from adopting variable terminating rates that are applied equally to all subscribers.

IT&E agrees with GTA's, Gov-Guam's, and Gov-Hawaii's assertion that rate integration requires the balancing of pro-competition, deregulatory goals with other goals such as universal service and rate averaging. See Joint Comments of GTA and Gov-Guam, at 3; Opposition of Gov-Hawaii, at 7-8. IT&E, however, respectfully disagrees with the unfounded assumption that Congress intended to foster universal service and rate averaging goals by denying IXCs the flexibility to adopt variable terminating rates.

Although IT&E understands the general concern that a strict interpretation of Section 254(g) would lead to disparities in rates for calls involving comparable distances and network facilities, IT&E believes that such a concern is not justified, since other statutory and regulatory provisions exist to prevent such rate disparities. In particular, Section 202(a) of the Act, 47 U.S.C. § 202(a), prohibits carriers from unjustly or unreasonably discriminating against similarly situated subscribers. Thus, while a strict interpretation of Section 254(g) would require all IXCs to charge their subscribers the same rates regardless of the subscriber's geographic location, Section 202(a) would effectively prohibit national IXCs, such as AT&T, MCI, and Sprint, from adopting variable terminating rates, since such rates would lead to unequal treatment among the national IXC's pool of subscribers.

For example, if a national IXC adopted domestically integrated rates for calls originating from Guam as required under Section 254(g), but nonetheless adopted higher rates for calls terminating in Guam, such a practice would be prohibited under Section 202(a) because it discriminates against subscribers who place calls to Guam and who would be required to pay more than subscribers on Guam for calls involving comparable distances and network facilities. On the other hand, IT&E believes that, to the extent that regional IXCs adopt rates that apply equally to all their subscribers, regardless of whether such rates vary depending on the terminating location, then such carriers have fully complied with the rate integration requirement

of Section 254(g) without engaging in any price discrimination. Consequently, IT&E firmly believes that a strict interpretation of Section 254(g) would not result in the rate disparities envisioned by the Commenters, but would strike the proper balance between the goals of competition and deregulation and those of universal service and rate averaging.

Since the pro-regulatory objective of rate integration is contrary to the general deregulatory, pro-competitive underpinnings of the Telecommunications Act of 1996 (“1996 Act”), it is crucial that the implementation of rate integration be consistent with the express statutory language and fully supported by the record. The Bureau’s interpretation of rate integration to strictly prohibit variable terminating rates does not satisfy either criteria. Moreover, as Congress envisioned when it passed the 1996 Act, competition – not government mandate – is the best regulator of prices and services. Although lacking a nationwide base of subscribers over which to spread the costs of rate integration and geographic rate averaging, regional carriers such as IT&E must nonetheless compete with national carriers, which do have such a base, in order to survive. In the battle to win over the relatively limited number of subscribers based on Guam and in the CNMI, IT&E has shown its willingness to compete by offering attractive prices, innovative services, and superior attention to customers’ needs, thus accomplishing the ultimate objectives of the 1996 Act.

III. Temporary Promotions and Private Line Services Should Be Exempted from Rate Integration

Although Gov-CNMI, Gov-Hawaii, and Gov-Alaska oppose extending any exemption from the FCC’s rate integration rule to temporary promotions and private line services, they fail to offer any rational explanation for the apparent conflict between the Commission’s exemption of temporary promotions and private line services from geographic rate averaging and the Bureau’s refusal to exempt such services from rate integration. Although Gov-Hawaii attempts to draw a distinction between geographic rate averaging and rate integration in terms of rates and

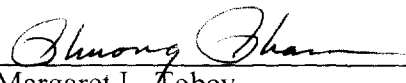
rate structures, it does provide any support in law or policy for such a distinction. See Opposition of Gov-Hawaii, at 2-3. Moreover, such a distinction fails to offer any justification for the Commission's and the Bureau's inconsistent exemption policies regarding geographic rate averaging and rate integration. As IT&E noted in its Application for Review, such inconsistent exemption policies unfairly discriminate against IXC's serving U.S. offshore areas by prohibiting such carriers from providing temporary promotions and private line services at rates and on terms and conditions that vary based on a subscriber's geographic location, while exempting IXC's serving the U.S. mainland from such a prohibition. See IT&E Application for Review, at 8. In view of such an absurd result, IT&E does not believe that the Commission intended to exempt temporary promotions and private line services only from geographic rate averaging, but not from rate integration. Indeed, GTA and Gov-Guam have acknowledged the apparent conflict between the Commission's exemption policy and the Bureau's action and accordingly support IT&E's request for Commission review of the Bureau's refusal to exempt temporary promotions and private line services from rate integration. See Joint Comments of GTA and Gov-Guam, at 4.

IV. CONCLUSION

Based on the foregoing, IT&E reiterates its request for the Commission to review and reverse the Bureau's denial of IT&E's asserted right to set rates that vary based on the terminating location of a call and to offer private line services and temporary promotions at rates and on terms and conditions that may vary based on a subscriber's geographic location.

Respectfully submitted,

IT&E OVERSEAS, INC.

By: 
Margaret L. Tobey
Phuong N. Pham

Akin, Gump, Strauss, Hauer & Feld, L.L.P.
1333 New Hampshire Avenue, NW
Suite 400
Washington, DC 20036
(202) 887-4000
(202) 887-4288 (fax)

November 12, 1997

Its Attorneys

CERTIFICATE OF SERVICE

I, Elizabeth Dickerson, an employee of Akin Gump Strauss Hauer & Feld, L.L.P., certify that the foregoing **CONSOLIDATED REPLY OF IT&E OVERSEAS, INC.** was served via hand-delivery or U.S. Mail, postage prepaid, on November 12, 1997, upon the following parties:

Magalie Roman Salas*
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

William E. Kennard*
Chairman
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

Susan P. Ness*
Commissioner
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

Harold Furchtgott-Roth*
Commissioner
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

Michael K. Powell*
Commissioner
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.C. 20554

Gloria Tristani*
Commissioner
Federal Communications Commission
1919 M Street, N.W.
Room 826
Washington, D.C. 20554

A. Richard Metzger*
Chief, Common Carrier Bureau/
Federal Communications Commission
1919 M Street, N.W.
Room 500
Washington, D.C. 20554

John Muleta*
Deputy Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 500
Washington, D.C. 20554

James D. Schlichting*
Chief, Competitive Pricing Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 518
Washington, D.C. 20554

Patrick Donovan*
Deputy Chief, Competitive Pricing Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 518
Washington, D.C. 20554

William Bailey*
Competitive Pricing Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 518
Washington, D.C. 20554

Wanda M. Harris*
Competitive Pricing Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 518
Washington, D.C. 20554

International Transcription Services*
1919 M Street, N.W.
Room 246
Washington, D.C. 20554

Veronica M. Ahern
Nixon, Hargrave, Devans & Doyle L.L.P.
One Thomas Circle, N.W.
Suite 700
Washington, D.C. 20005
Counsel for Guam Telephone Authority

Herbert E. Marks
James M. Fink
Squire, Sanders & Dempsey
1201 Pennsylvania Avenue, N.W.
P.O. Box 407
Washington, D.C. 20044-0407
Counsel for the State of Hawaii

Robert M. Halperin
Crowell & Moring, L.L.P.
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Counsel for the State of Alaska


Thomas K. Crowe
Michael B. Adams, Jr.
Law Offices of Thomas K. Crowe, P.C.
2300 M Street, N.W.
Suite 800
Washington, D.C. 20037
Counsel for the Commonwealth of
the Northern Marianas

The Honorable Carl T.C. Gutierrez
Governor of Guam
P.O. Box 2950
Agana, Guam 96910

Kathryn Matayoshi
Charles W. Totto
Department of Commerce & Consumer
Affairs
250 South King Street
Honolulu, Hawaii 96813

John W. Katz
Special Counsel to the Governor
Director, State-Federal Relations
Office of the State of Alaska
Suite 336
444 North Capitol Street, N.W.
Washington, D.C. 20001

David Ecret
Advisor, Office of the Governor of the
Commonwealth of the Northern Marianas
Caller Box 10007
Saipan, M.P.
Northern Mariana Islands 96950


Elizabeth Dickerson